SUPREME COURT OF KENTUCKY
CASE NO. 2015-SC-000371-TG

KENTUCKY RESTAURANT ASSOCIATION, INC., KENTUCKY RETAIL FEDERATION, INC., and PACKAGING UNLIMITED, LLC — **APPELLANTS**

v.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
JUDITH MCDONALD-BURKMAN, JUDGE
CASE NO. 15-CI-000754

LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT — **APPELLEE**

APPELLANTS' REPLY BRIEF

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of this **Appellants' Reply Brief** were served by first class U.S. mail, postage prepaid, this 10th day of February, 2016 upon the following: Michael J. O'Connell, E. Patrick Mulvihill, David A. Sexton and Sarah J. Martin, Jefferson County Attorney, 531 Court Place – Suite 900, Louisville, Kentucky 40202; Clerk of Jefferson Circuit Court, Judicial Center, 700 W. Jefferson Street, Louisville, Kentucky 40202; Honorable Judith McDonald-Burkman, 700 W. Jefferson Street, Louisville, Kentucky 40202. The undersigned further certifies that Appellants have returned the record on appeal.

COUNSEL FOR APPELLANTS

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

Appellants submit this Reply Brief to address arguments made in the Brief of Appellee, Louisville/Jefferson County Metro Government ("Louisville"), the amicus briefs submitted by the National Employment Law Project ("NELP"), and the brief submitted by a host of other amici supporting Louisville's minimum wage ordinance ("Ordinance"), led by the Kentucky Equal Justice Center ("KEJC").

With respect to the governmental powers issues now before this Court, Louisville, NELP, and KEJC collectively strike five major themes: (1) that Louisville possesses near-plenary home rule powers, heretofore unrecognized by this or any other appellate court; (2) that, despite this Court's 2004 invalidation of a Louisville ordinance based solely upon comprehensive scheme conflict, express legislative preemption is nonetheless required, thereby ignoring the comprehensive legislative scheme embodied in the 44 statutes comprising, and 20 regulations promulgated under, the Wages and Hours Law; (3) that the *savings* provision in the federal Fair Labor Standards Act ("FLSA") somehow *commands* states to defer to more generous local minimum wage provisions; (4) that a savings provision referencing Kentucky's statutes and Constitution should not be read as written, but should instead be construed to validate local standards;[1] and (5) that the Ordinance lawfully permits private parties to enforce its terms in a circuit court cause of action. Although each of these points will be addressed, in turn, it is

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[1] With the limited space available in this Reply Brief, Appellants simply note that the language the General Assembly chose to use in KRS 337.395 – providing that wage standards "in effect under any other law ***of*** this state which are more favorable to employees than standards" contained in the Wages and Hours Law "shall ***continue*** in force and effect" (emphasis added) – means what it says, and is not a license for cities to go their own way in regulating wage and hour matters for private sector employees. *See* Appellants'Br., pp. 15-16. Moreover, the provision really only served to grandfather "law[s] of this state," i.e., state statutes, in existence at the time of its 1974 enactment, rather than any prospective effect (and certainly not the effect Louisville ascribes to it concerning local ordinances adopted years later).

significant that Louisville never actually addressed the key issue before this Court: whether the Wages and Hours Law is a comprehensive scheme of legislation which precludes contrary local ordinances.[2]

ARGUMENT

A. Louisville Has Never Been Found To Possess The Near-Plenary Home Rule Powers It Now Claims For Itself.

Although Louisville claims to possess virtually unlimited home rule powers, our State Constitution, myriad statutes, and a multitude of appellate decisions conclusively tell a different story: a local ordinance may not conflict with the laws of this state.[3] Despite Louisville's claim to have comprehensively studied the Ordinance, including its legality, prior to adoption, it is instructive that Louisville's analysis was once premised upon KRS 82.082, a statute it now eschews in favor of previously unrecognized plenary

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[2] In previous ordinance challenges, this Court has chosen not to address the wisdom behind the ordinance at issue, *Lexington Fayette Cty. Food & Beverage Ass'n v. Lexington-Fayette Urban Cty. Gov't*, 131 S.W.3d 745, 748-49 (Ky. 2004), and Appellants will not do so here. Appellants do, however, concur with the Brief of Amicus Curiae, Kentucky Grocers Association/Kentucky Association of Convenience Stores ("KGA"). Indeed, the KGA's concerns about the economic and regulatory balkanization of the Commonwealth through divergent local minimum wage enactments finds explicit support from sister-state courts. *See*, e.g., *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170, 581 S.E.2d 415, 428-29 (2003) ("Upholding the particularized laws [permitting a single county to enforce its own human rights ordinance] in this case could lead to a balkanization of the state's employment discrimination laws, creating a patchwork of standards varying from county to county. The end result would be the 'conglomeration of innumerable discordant communities' that [North Carolina's Constitutional prohibition on local or special legislation] was enacted to avoid."). *Accord, Louisville/Jefferson County Metro Government v. O'Shea's–Baxter, LLC*, 483 S.W.3d 379 (Ky. 2014) (this Court invalidated, as unconstitutional local or special legislation under Ky. Const. § 59, statute regulating placement of liquor stores in Jefferson County at odds with their placement elsewhere in the Commonwealth). Likewise, the Attorney General's concerns, expressed in an amicus brief (Appellants' Br., Tab F), that a patchwork of right-to-work ordinances varying between Kentucky's 120 counties and over 400 cities would undermine the Commonwealth's "obvious and significant public interest in determining uniformity of working terms and conditions throughout the state" are mirrored in the KGA's and *Williams* court's recognition of the adverse consequences stemming from divergent local wage and hour standards.

[3] Notably, the Missouri Supreme Court, in Case No. SC95401, will be conducting a contemporaneous analysis of the same issue—whether the an ordinance raising the minimum wage enacted by the city of St. Louis conflicts with the general laws of Missouri. On October 14, 2015, a Missouri Circuit Court held that St. Louis ***did not*** have authority to enact the ordinance because it conflicted with Missouri's wage and hour laws. *Cooperative Home Care, Inc. v. City of St. Louis, Missouri*, Case No. 1522-CC10607 (Order attached at Tab A).

authority under KRS 83.410 and .520.[4] Although these provisions are certainly part of the home rule analysis, they do not have the controlling effect Louiville now ascribes to them. Surely, if Louisville actually possessed such plenary authority, a court would have recognized it in the 44 years since the General Assembly enacted KRS 83.410 and .520.

In fact, as this Court held in *Ky. Licensed Beverage Ass'n v. Louisville-Jefferson Cnty. Metro Gov't*, 127 S.W.3d 647 (Ky. 2004), Louisville ordinances ***are*** subject to the implied conflicts analysis found at KRS 82.082. Indeed, this Court invalidated the ordinance specifically because the General Assembly had provided a comprehensive scheme of legislation on the same general subject. And applying that conflicts analysis here establishes that the Wages and Hours Law is also a comprehensive scheme of legislation on the same subject matter as the Ordinance, thereby precluding its enforcement.[5]

What this Court did ***not*** do when analyzing the validity of that ordinance is also instructive. This Court did not even cite KRS 83.410 and .520, and thus did not hold that these statutes grant Louisville the "complete grant of home rule" it now claims to possess. And that was not simply an oversight by the Court, as KRS 83.410 itself contains the very restriction to Louisville's powers found in all of the other home rule statutes, i.e., that the exercise of local governments' powers not "conflict with the Constitution or laws of this state . . . ."[6]

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[4] The County Attorney's August 25, 2014 opinion letter to Metro Council is attached at Tab B.

[5] Moreover, as noted in Appellants' Brief, the Kentucky Attorney General and Kentucky's Legislative Research Commission have concluded that KRS 82.082 limits Louisville's authority to enact ordinances and must be considered in determining their validity. Appellants' Br., p. 7.

[6] To the extent Louisville may be suggesting that KRS 82.410 and .520 dispense with conflicts analysis, the Kentucky Constitution governs over any allegedly conflicting statute. Although Louisville failed to address Appellants' argument concerning its effect (Appellants' Br. p. 5), Kentucky Constitution §156b

Lastly, Louisville argues that Kentucky rules on statutory construction command a later statute be given effect over an earlier statute. Appellee's Br. p. 5-6. Appellants wholeheartedly agree, and emphasize that KRS 82.082 was enacted eight years after the Legislature enacted KRS 83.410, .420, and .520. As explained in Appellants' Brief, by enacting KRS 82.082, the General Assembly was not only "restat[ing] the well-established common law in Kentucky on the relationship of local ordinances to state law,"[7] it was providing a definition for the kind of conflict which would invalidate an ordinance. The fact that KRS 67C.101 went into effect in 2002 does not diminish the applicability of KRS 82.082 here, and does not change the fact that all of the aforementioned statutes must be construed *in pari materia*. Appellant's Br. p. 8.

Thus, any home rule power Louisville seeks to exercise through the Ordinance is only valid subject to the implied conflicts analysis, requiring that the Ordinance not be on the same general subject as a comprehensive scheme of legislation embodied in Kentucky law.

B. Louisville Insists That Express Legislative Preemption Is Necessary, Ignoring This Court's Comprehensive Scheme Jurisprudence.

Louisville unnecessarily points out the absence of an express legislative prohibition against a local minimum wage ordinance. (Appellee's Br., pp. 13-16). But this is a red herring, as Appellants have never contended that the Wages and Hours Law

unequivocally ends any possible debate in that regard, providing: "The General Assembly may provide by general law that cities may exercise any power and perform any function within their boundaries that is in furtherance of a public purpose of a city ***and not in conflict with a constitutional provision or statute.***" (emphasis added). Courts are universally reluctant to construe a statute to create a constitutional conflict when another construction can avoid that conflict. *See Commonwealth Natural Res. & Envtl. Prot. Cabinet v. Kentec Coal Co.*, 177 S.W.3d 718, 724 (Ky. 2005) For the reasons set forth above, there is no reason to do so here.

[7] Kentucky LRC, Informational Bulletin No. 145: Kentucky Municipal Statutory Law (Nov. 2014), available at http://www.lrc.ky.gov/lrcpubs/ib145.pdf at p. 43.

expressly bars the Ordinance. Were that so, one must presume that local government would not have brazenly ignored an express prohibition.

Instead, as Appellants have always argued, the standard by which this Ordinance is to be judged is whether there is a comprehensive scheme of state legislation on the same general subject, thereby creating a conflict which renders the Ordinance invalid. *See Ky. Licensed Beverage Ass'n*, 127 S.W.3d at 648-49, 51 (citing KRS 82.082).[8] And the opinion Louisville and NELP[9] repeatedly cite, *Lexington-Fayette County Food & Beverage Ass'n v. Lexington-Fayette Urban County Gov't*, 131 S.W.3d 745 (Ky. 2004), does nothing to alter this proposition. While noting that express preemption requires "clear and unmistakable language," the Court did not even remotely suggest that implied preemption – the only preemption that Appellants have ever argued here – requires such demanding scrutiny. *Id.* at 752. Rather, the Court rejected the challenge to the Lexington smoking ordinance because there was no comprehensive system of legislation addressing public smoking, as a disparate assortment of state statutes touching upon smoking were "not a comprehensive system of legislation on smoking but are a collection of various statutes that mention smoking in a specific context." *Id.* at 751.

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[8] The *Ky. Licensed Beverage Ass'n* case concerned KRS 241.140, a statute Louisville cites as an example of the General Assembly's exercise of express preemption. Appellee's Br. p. 15. Yet as explained earlier, this Court analyzed the ordinance's validity using the comprehensive scheme test, finding KRS 241.140 to be a part of a comprehensive scheme of legislation. *Ky. Licensed Beverage Ass'n*, 127 S.W.3d at 649-51. In the very same paragraph this Court found a conflict, it also cited *Boyle v. Campbell*, 450 S.W.2d 265 (Ky. 1970), which distinguished the doctrines of "preemption" from the doctrine of "conflict."

[9] NELP also cites to *Snyder v. City of Owensboro*, 555 S.W.2d 246 (Ky. 1977) for the proposition that this Court has previously upheld local ordinances that set a higher minimum wage. However, NELP's reliance on *Snyder* is inapposite; it is axiomatic that a public employer—such as the City of Owensboro—has authority to enact ordinances establishing hourly wage rates for its own employees—such as members of the City's fire department. Clearly, a public employer can decide to pay ***its own employees*** more than the state minimum wage if it wishes. Therefore, the *Snyder* court's decision is irrelevant to the issues in this appeal.

Accordingly, while the absence of generally applicable statewide public smoking standards created no conflict with the Lexington ordinance, by contrast the comprehensive scheme governing wage and hour standards found in KRS Chapter 337 poses an inherent conflict with an Ordinance attempting to regulate the same subject matter, and imposing different standards than those in effect throughout the state.

C. Louisville Insists That The FLSA Commands States To Accept Local Minimum Wage Ordinances, But The FLSA's Comprehensive Scheme Actually Supports The Argument That Louisville Lacks The Power To Deviate From The Wages And Hours Law's Comprehensive Scheme.

Louisville's reliance on the FLSA is misplaced, as that statute actually supports Appellants' comprehensive scheme analysis. This Court has described the Wages and Hours Law found in "KRS Chapter 337 [to be] Kentucky's analogue to the Fair Labor Standards Act." *City of Louisville, Div. of Fire v. Fire Service Managers Ass'n*, 212 S.W.3d 89, 92 (Ky. 2006). Moreover, because "the substantive provisions of the FLSA . . . are substantially similar to those in KRS Chapter 337 and the relevant administrative regulations . . ." this Court has "look[ed] to federal cases for guidance" in interpreting the Wages and Hours Law. *Id.* at 95. And that federal acknowledges that the FLSA is a comprehensive scheme. *See*, e.g., *Lamon v. City of Shawnee, Kan.*, 972 F.2d 1145, 1149 (10th Cir. 1992) ("With the passage of FLSA in 1938, Congress established a comprehensive remedial scheme requiring a minimum wage and limiting the maximum number of hours worked, absent payment of an overtime wage for all hours worked in excess of the specified maximum number."). Accordingly, if the FLSA is a comprehensive scheme, and the Wages and Hours Law is its statutory analogue, then the Law likewise constitutes a comprehensive scheme, which preempts the field of its application.

Finally, with respect to ordinance validity, Louisville makes the remarkable assertion that the Federal Fair Labor Standards Act "inarguably authorizes cities like Louisville to increase the minimum wage above the rate set by the federal government." (Appellee's Br., p. 20). For this proposition, Louisville cites 29 U.S.C. §218(a) as expressing Congressional will on the question of municipal authority in the area of minimum wages. Armed with what it claims is the federal government's ***authorization***, Louisville goes even further, suggesting that the Ordinance is above challenge as a matter of federal supremacy. *Id.* Under this reasoning, the states – and their citizens – are apparently left powerless to challenge a local ordinance establishing a higher minimum wage rate. Such a proposition would turn federalism – the concept that the federal government is one of limited enumerated powers while the states possess plenary police powers – on its head. *See* U.S. Const., Amend. 10.

But the provision says nothing that could even remotely be read to deprive the states of sovereignty vis-a-vis municipalities. Indeed, the statute at issue is actually a savings clause preserving more generous state laws and local ordinances from challenge premised on federal preemption. *See* 29 U.S.C.A. § 218. It would be odd indeed to transform a Congressional intent ***against preemption*** into a Congressional ***command*** that local ordinances increasing the minimum wage are beyond challenge under state law.

D. Louisville Cannot Create A Private Judicial Cause Of Action To Enforce An Ordinance Which Conflicts With State Law.

Amicus NELP contends that this argument is purely derivative of Appellants' governmental powers arguments. (NELP Br., p. 11). Although a finding that Louisville lacks the power to adopt the Ordinance would render moot the additional private judicial

cause of action argument, it also serves as an independent basis for invalidating that part of the Ordinance.

Louisville relies on KRS 337.020 as a way to privately enforce the Ordinance without resort to the requisite enforcement machinery, usually accomplished through citations and fines. Because the Ordinance premises its civil cause of action upon KRS 337.020 for non-payment of "wages due", that necessarily presumes a violation of that statute. But the wages at issue wouldn't be due under KRS 337.020 absent Louisville compelling employers to pay higher wages than would otherwise be due.[10] In this regard, the Ordinance unlawfully affords Louisville a way to bootstrap the greater remedies available through KRS 337.385, including liquidated damages and attorney fee provisions for violations of KRS 337.020. Moreover, if violating the Ordinance is indeed a violation of KRS 337.020, the Ordinance effectively commandeers the Kentucky Department of Labor enforcement machinery by compelling issuance of fines under KRS 337.990(1).

It is significant that NELP's strongest authority is an unpublished footnote discussion about a neighbor's standing to enforce zoning restrictions. *See* NELP Amicus Br., pp. 12-13. Yet "Kentucky courts have held that a property owner has no private cause of action to bring suit against another property owner for a violation of an ordinance . . . . because the property owner owes a duty to follow the ordinance to the municipality, not to another party." *Merrick v. Diageo Americas Supply, Inc.*, 5 F. Supp. 3d 865, 877 (W.D. Ky. 2014) *aff'd*, 805 F.3d 685 (6th Cir. 2015) (holding that plaintiffs

[10] The case Louisville relies upon for its counterpoint, *Healthcare of Louisville v. Kiesel*, 715 S.W.2d 246 (Ky. 1986), has been rejected and strongly questioned by the Sixth Circuit. *See Whitewood v. Robert Bosch Tool Corporation*, 323 F. App'x 397 (6th Cir. 2009).

could not maintain a private cause of action based on defendant's alleged violation of a city ordinance or regulation).

NELP and KEJC each prominently cite a 1969 Maryland Court of Appeals opinion to bolster their governmental powers arguments. But that very court, faced with a local ordinance purporting to create a private cause of action, held that, absent explicit legislative authorization of a private cause of action, none can be permitted. *McCrory Corp. v. Fowler*, 319 Md. 12, 570 A.2d 834 (1990). In reaching this decision, the court cited the following passage from McQuillin's *Municipal Corporations*:

> The well-established general rule is that a municipal corporation cannot create by ordinance a right of action between third persons or enlarge the common law or statutory duty or liability of citizens among themselves. Under the rule, an ordinance cannot directly create a civil liability of one citizen to another or relieve one citizen from a liability by imposing it on another.

Id., 570 A.2d at 839, *quoting* 6 McQuillin, *Municipal Corporations* (3d Ed. Rev.) § 22.01;[11] *see also Williams*, 357 N.C. 170, 581 S.E.2d 415, 430 (2003) (North Carolina Supreme Court held that county does not have inherent authority to pass an employment discrimination ordinance granting private parties the right to sue, noting that the "new and independent framework for litigation [under the ordinance] substantially exceeds the leeway permitted to individual counties" under home rule statutes).

For over a century, Kentucky's appellate courts have repeatedly looked to McQuillin for its analysis of municipal laws. *See, e.g., Spalding v. City of Lebanon*, 156 Ky. 37, 160 S.W. 751, 753 (1913); *Bowling Green-Warren County Airport Bd. v. Long*, 364 S.W.2d 167, 170 (Ky. 1962); *Wells v. Town of Mt. Olivet*, 126 Ky. 131, 102 S.W.

[11] In response to the *McCrory* decision, Maryland's legislature expressly authorized a direct civil action. *See Pope-Payton v. Realty Mgmt. Services, Inc.*, 149 Md. App. 393, 815 A.2d 919, 923-24 (2003).

1182, 1183 (Ky. 1907); *Snowden v. City of Wilmore*, 412 S.W.3d 195, 207 (Ky. App. 2013). And McQuillin's rejection of a right of action created by ordinance compels the conclusion that Louisville cannot create such a right either.

CONCLUSION

For the foregoing reasons, as well as those set forth in Appellants' Brief, Appellants respectfully request that this Court reverse the Circuit Court, and grant them declaratory and injunctive relief, barring enforcement of Louisville's invalid Ordinance.

Respectfully submitted,

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APPENDIX LIST

Tab	Description	Record Page
A.	October 14, 2015 Order in *Cooperative Home Care, Inc. v. City of St. Louis, Missouri*, Case No. 1522-CC10607	N/A
B.	The County Attorney's August 25, 2014 opinion letter to Metro Council	145-150